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BEFORE THE -4 AM  
FEDERAL ELECTION COMMISSION

Brad Woodhouse  
American Democracy Legal Fund  
455 Massachusetts Avenue, NW  
Washington, DC 20001

OFFICE OF GENERAL

Complainant,

v.

Josh Hawley  
Missouri Attorney General  
207 W. High St.  
Jefferson City, MO 65102

Hawley for Missouri  
Doug Russell, Treasurer  
PO Box 1073  
Columbia, MO 65205

MUR # 7267

Respondents.

COMPLAINT

Complainant files this complaint with the Federal Election Commission (the "FEC" or "Commission") under 52 U.S.C. § 30109(a)(1) against Josh Hawley, Hawley for Missouri, and Doug Russell in his official capacity as treasurer ("Respondents") for using prohibited funds for federal "testing the waters" activities and failing to timely file as a candidate for the U.S. Senate in direct violation of the Federal Election Campaign Act of 1971, as amended (the "Act") and FEC regulations. The Commission should immediately investigate these claims and take appropriate remedial action against Respondents for these clear violations of law, as described below.

A. FACTUAL BACKGROUND

Mr. Hawley was elected as the Missouri Attorney General on November 8, 2016 and sworn into office on January 9, 2017.<sup>1</sup> His former campaign committee, Hawley for Missouri, has

<sup>1</sup> See About Us, Missouri Attorney General, available at <https://www.sgo.mo.gov/about-us> (last accessed Jul. 31, 2017).

remained active since his election; according to the most recent Statement of Committee Organization on file with the Missouri Ethics Commission, Hawley for Missouri is raising and spending funds in connection with Hawley's next statewide election in August of 2020.<sup>2</sup>

News sources report that Republican leaders are urging Mr. Hawley to seek the Republican nomination in next year's Senate race in Missouri; other sources say he has been the Republican frontrunner for the nomination since "early spring" of this year.<sup>3</sup> While Mr. Hawley has yet to publicly confirm whether he will run for federal office, since January of 2017, Hawley for Missouri has reportedly "shell[ed] out almost \$170,000 in campaign funds for media production, direct mail and other promotional services... using some of the same media consultants he used during his [previous] campaign for attorney general."<sup>4</sup> This includes, for example, \$30,000 for "strategic planning" to HLC Strategies LLC; \$30,000 for "media production fees" to OnMessage Inc.; \$62,480 to the Kam Company for "finance consulting and commission;" and \$24,643 for "direct mailing" to the Singularis Group.<sup>5</sup> Each of these vendors was used by Hawley in his 2016 campaign.<sup>6</sup>

<sup>2</sup> Hawley for Missouri, MEC Statement of Committee Organization - Amended (filed Mar. 27, 2017), available at <http://www.mec.mo.gov/Scanned/PDF/2017128050.pdf>.

<sup>3</sup> David M. Drucker, *Republicans Turn to Josh Hawley to Challenge Sen. Claire McCaskill*, Washington Examiner (Jul. 3, 2017), available at <http://www.washingtonexaminer.com/republicans-turn-to-josh-hawley-to-challenge-sen-claire-mccaskill/article/2627691>; see also Kevin McDermott, *Four ex-U.S. Senators Urge Hawley to Run for Senate Next Year*, St. Louis Post-Dispatch (Jul. 20, 2017), available at [http://www.stltoday.com/news/local/govt-and-politics/four-ex-u-s-senators-urge-hawley-to-run-for-pricle\\_0eb7b1be-a56f-5216-84eb-32d7d66f3bd5.html](http://www.stltoday.com/news/local/govt-and-politics/four-ex-u-s-senators-urge-hawley-to-run-for-pricle_0eb7b1be-a56f-5216-84eb-32d7d66f3bd5.html).

<sup>4</sup> Kevin McDermott, *Hawley Says He Isn't Focused on Possible Senate Run; His Campaign Spending Hints Otherwise*, St. Louis Post-Dispatch (Jul. 25, 2017), available at [http://www.stltoday.com/news/local/govt-and-politics/hawley-says-he-isn-t-focused-on-possible-senate-run/article\\_7624772d-eced-53d6-ad00-6c8a7f6d9575.html?uun\\_source=dlvr:if&utm\\_medium=twitter](http://www.stltoday.com/news/local/govt-and-politics/hawley-says-he-isn-t-focused-on-possible-senate-run/article_7624772d-eced-53d6-ad00-6c8a7f6d9575.html?uun_source=dlvr:if&utm_medium=twitter); see also Hawley for Missouri, MEC April Quarterly Report (filed Apr. 17, 2017), available at

[http://www.mec.mo.gov/CampaignFinanceReports/Generator.aspx?Keys=B2G41dEVPKgl8cDcdGFs9Jsm99XwPL2G8KrvNM1Ik05RKSHoAnIsjarBxaKvI09Na8Zqlrbt26u2lmm9gZ2f6AuYEIS\\*42fPvI](http://www.mec.mo.gov/CampaignFinanceReports/Generator.aspx?Keys=B2G41dEVPKgl8cDcdGFs9Jsm99XwPL2G8KrvNM1Ik05RKSHoAnIsjarBxaKvI09Na8Zqlrbt26u2lmm9gZ2f6AuYEIS*42fPvI); Hawley for Missouri, MEC July Quarterly Report (filed Jul. 17, 2017), available at <http://www.mec.mo.gov/CampaignFinanceReports/Generator.aspx?Keys=B2G41dEVPKgl8cDcdGFs9Jsm99XwPL2G4n6vixIClHonF13BfKbHfCu762fXMmkybCwCrSvSTb73CDZ72SAZlImmgO5Jw8xA55>.

<sup>5</sup> MEC April Quarterly Report, *supra* note 4.

<sup>6</sup> Hawley for Missouri, MEC October Quarterly Report (filed Oct. 17, 2016), available at <http://www.mec.mo.gov/CampaignFinanceReports/Generator.aspx?Keys=B2G41dEVPKgl8cDcdGFs9Jsm99XwPL2G4n6vixIClHonF13BfKbHfCu762fXMmkybCwCrSvSTb73CDZ72SAZlImmgO5Jw8xA55>.

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With these funds, Hawley for Missouri has produced advertisements and videos for the Attorney General, one of which highlights his work on human trafficking.<sup>7</sup> According to news sources, that “high-production-quality video looks almost indistinguishable from a paid political campaign ad: The visual is entirely Hawley talking into the camera, promising action on the issue as music plays behind him, with a slogan and logo at the end.”<sup>8</sup> The same source goes on to report that, while “[t]he content [of the video] is technically about one of Hawley’s official duties as attorney general... the video specifies that it was paid for by the ‘Hawley for Missouri’ campaign.”<sup>9</sup> And despite being paid for by Hawley for Missouri, the video makes no reference to Hawley’s campaign for reelection as Attorney General, nor does it mention any upcoming state elections.

According to Hawley’s spokesperson, “he’s seriously considering a Senate bid but has not made a final decision.”<sup>10</sup> While considering his options, Hawley has reportedly traveled to Washington D.C. to meet with Republican leaders and stakeholders.<sup>11</sup> It appears Hawley has also retained a consultant for his 2018 Senate bid; according to Politico “OnMessage’s Brad Todd will be Hawley’s consultant, as he was for Hawley’s attorney general run.”<sup>12</sup> This is the same OnMessage that Hawley for Missouri has been using for media production since Hawley’s last campaign.<sup>13</sup>

And while Hawley has yet to announce his decision to the public, a number of individuals have already confirmed Hawley’s intentions to run for Senate. For example, former State Senator Jane Cunningham tweeted that “[b]ased on good authority, I have every confidence that Josh

<sup>7</sup> Hawley for Missouri, *Josh Hawley: Combatting Human Trafficking*, YouTube (Apr. 6, 2017), <https://www.youtube.com/watch?v=X7zY4sVilHg>.

<sup>8</sup> McDermott, *supra* note 4.

<sup>9</sup> *Id.*

<sup>10</sup> Deirdre Shesgreen, *Josh Hawley Mum on Senate Bid, But Others Buzzing*, News Leader (Jul. 21, 2017), available at <http://www.news-leader.com/story/news/politics/2017/07/21/josh-hawley-mum-senate-bid-but-others-buzzing/590185001>.

<sup>11</sup> Bryan Lowry, *Missouri Attorney General Hawley Visits D.C. as He Weighs Senate Run*, The Kansas City Star (Jul. 26, 2017), available at <http://www.kansascity.com/news/local/news-columns-blogs/the-buzz/article163811378.html>.

<sup>12</sup> Kevin Robbillard, *Sources: Hawley to Challenge McCaskill*, Politico (Jul. 19, 2017), available at <http://www.politico.com/fipsheets/morning-score/2017/07/19/sources-hawley-to-challenge-mccaskill-221-105>.

<sup>13</sup> See *supra*, note 4.

Hawley will run for the U.S. Senate.”<sup>14</sup> Similarly, “[t]he founder and national president of the Susan B. Anthony List, a prominent anti-abortion political advocacy group, tweeted...that she was ‘Meeting with MO US Senate candidate AG Josh Hawley in a few minutes.’”<sup>15</sup> Other sources say Hawley’s own associates have confirmed his plans to run for the Senate in 2018.<sup>16</sup> To date, Hawley has yet to file his statement of candidacy with the FEC.

## B. LEGAL ANALYSIS

### i. Impermissible Funds used for Federal Testing the Waters Activity

An individual qualifies as a federal “candidate” whenever he or she has received contributions or made expenditures aggregating in excess of \$5,000.<sup>17</sup> Upon exceeding this \$5,000 threshold, the individual is a federal candidate and must register and report as such with the FEC.<sup>18</sup> However, the Commission has established “limited exceptions to these automatic thresholds, which permit an individual to test the feasibility of a campaign for federal office without becoming a candidate under the Act.”<sup>19</sup>

Activities which are conducted within these “testing the waters” exemptions do not result in a contribution or expenditure, and therefore do not by themselves cause the person to become a candidate under the Act. This allows individuals to avoid registration and reporting obligations until they have decided to run, or until they have conducted activities that indicate they have decided to become a candidate.<sup>20</sup> In order to qualify as “testing the waters” activity, the activity must be

<sup>14</sup> Shesgreen, *supra* note 10.

<sup>15</sup> Kevin McDermott, *In Latest Hint of Senate Run, Anti-Abortion Leader Calls Hawley ‘Candidate’ Then Deletes Tweet*, St. Louis Post-Dispatch (Jul. 26, 2017), available at [http://www.stltoday.com/news/local/govt-and-politics/in-latest-hint-of-senate-run-anti-abortion-leader-calls/article\\_e912647b-c084-56cc-a491-d93152c6710b.html](http://www.stltoday.com/news/local/govt-and-politics/in-latest-hint-of-senate-run-anti-abortion-leader-calls/article_e912647b-c084-56cc-a491-d93152c6710b.html). According to news sources, the tweet was deleted a short time after it was posted.

<sup>16</sup> Robbillard, *supra* note 12.

<sup>17</sup> 52 U.S.C. § 30101(2); 11 C.F.R. §§ 100.3(a); see also Explanation and Justification for Regulations on Payments Received for Testing the Waters Activities, Fed. Reg. 50 Fed. Reg. 9992 (March 13, 1985).

<sup>18</sup> 11 C.F.R. §§ 100.3(a), 101.1(a).

<sup>19</sup> First General Counsel’s Report at 6, MUR 5722 (Friends of Lauzen); see generally 11 C.F.R. §§ 100.72, 100.131.

<sup>20</sup> 11 C.F.R. § 100.72 (a) (exempting “[f]unds received solely for the purpose of determining whether an individual should become a candidate” from the definition of contribution); *id.* at § 100.131(a) (exempting “[p]ayments made

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conducted "solely for the purpose" of "determining whether [the] individual should become a candidate."<sup>21</sup> Under FEC regulations, testing the waters activities include, but are not limited to, payments for polling, telephone calls and travel. The regulations further state that only federally permissible funds may be used for such testing the waters activities.<sup>22</sup>

"In Advisory Opinion 1981-32, the Commission considered travel by the potential candidate [and] employment of political consultants...to be for the purpose of testing the waters provided that the activity was solely to determine whether one should become a candidate."<sup>23</sup> In that instance, the consultant was hired for the purpose of arranging and coordinating speaking engagements, disseminating copies of speeches and arranging for the publication of articles in newspapers and periodical. The FEC interpreted the consultant's role as an activity that "appear[s] to project [the individual] to the public as a person qualified to be taken seriously as a presidential contender."<sup>24</sup> The Commission has reached similar conclusions regarding expenditures for political consultants, direct mail campaigns and travel in Advisory Opinions 1982-03 and 1985-40, where each activity was found to qualify as a testing the waters activity.<sup>25</sup>

Here, according to Hawley's own spokesperson, Hawley is "seriously considering" a run for U.S. Senate in the 2018 election.<sup>26</sup> These deliberations coincide with expenditures of \$170,000 by Hawley for Missouri for media production, strategic consulting, direct mail and travel to Washington, D.C. to meet with Republican leaders. The expenditures have also been used to produce a video of Hawley that clearly projects him to the public as a "person qualified to be taken seriously" as a Senate contender. And despite the video being paid for by a state campaign

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solely for the purpose of determining whether an individual should become a candidate" from the definition of expenditure).

<sup>21</sup> See 11 C.F.R. §§100.72(a), 100.131(a).

<sup>22</sup> *Id.*

<sup>23</sup> General Counsel's Report, MUR 2262 (Robertson).

<sup>24</sup> FEC Adv. Op. 1981-32 (Askew).

<sup>25</sup> FEC Adv. Ops. 1985-40 (Republican Majority Fund ), 1982-03 (Cranston).

<sup>26</sup> Shesgreen, *supra* note 10.

committee allegedly spending money for Hawley's reelection in 2020, the video is conspicuously silent on any upcoming state election in Missouri or Hawley's reelection as Attorney General.

While Hawley has not announced that these expenses are being incurred for the purpose of determining whether he should run for Senate, it is the clear implication of the facts at hand. Mr. Hawley is using the exact same vendors he used in his previous campaign. These vendors were hired to conduct campaign activity for Hawley in 2016. At least one of the vendors has already been retained by Hawley to work on his Senate campaign in 2018.<sup>27</sup> The continued support and promotion of Hawley by these vendors, particularly the one retained for his Senate campaign, now qualifies as testing the waters activity as he considers his run for Senate.

However, as explained above, Commission regulations are clear that only funds permissible under the Act may be used for testing the waters activities.<sup>28</sup> And the Commission has already decided that state campaign committee funds may *not* be used for testing the waters activity for a potential federal candidate.<sup>29</sup> In that instance, a state campaign committee argued that an exploratory poll for a state senator's potential run for Congress was not a testing the waters activity because the state senator was seeking reelection as *state* senator when the poll was conducted. The FEC's General Counsel's office rejected that argument, explaining that a simultaneous run for state office did not preclude the state senator from exploring a possible run for Congress.<sup>30</sup> Ultimately the "Commission concluded that an individual considering a run for Federal office may not pay for testing the waters activity with money from a state campaign account, regardless of whether the funds in that account are Federally permissible."<sup>31</sup>

<sup>27</sup> Robbillard, *supra* note 12.

<sup>28</sup> See 11 C.F.R. §§100.72(a), 100.131(a).

<sup>29</sup> First General Counsel's Report at 1, MUR 5722 (Friends of Lauzen).

<sup>30</sup> *Id.* at 8.

<sup>31</sup> Statement of Reasons of Commissioner Hans A. von Spakovsky, MUR 5722 (Friends of Lauzen).

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There is no question as to the source of funding for these testing the waters activities. Hawley for Missouri has filed two campaign finance reports with the state of Missouri in 2017, disclosing an accumulation of \$170,000 in expenses for strategic planning, media production fees, finance consulting and direct mail campaigns.<sup>32</sup> As a state campaign committee, the use of such funds for testing the waters activities is a clear a violation of Act and regulations. And unfortunately, the fact that Hawley might also be considering a run for reelection as Attorney General does not preclude these expenses from qualifying as testing the waters activities.

ii. *Failure to Timely File as Candidate for U.S. Senate*

The regulations are clear that the testing the waters exemptions do not apply to individuals who have already decided to become a candidate.<sup>33</sup> “[T]he regulations seek to draw a distinction between activities directed to an evaluation of the feasibility of one’s candidacy, as distinguished from conduct signifying that a private decision to become a candidate has been made.”<sup>34</sup> In fact, the FEC has previously found that if an individual has spent more than \$5,000 on testing the waters activities, candidacy is triggered once that individual makes a private determination to run for federal office.<sup>35</sup>

The regulations provide a list of specific activities that indicate that an individual has decided to become a candidate.<sup>36</sup> The regulations also make clear that the list is not exhaustive and that other activities may indicate that an individual has decided to become a candidate for federal

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<sup>32</sup> See *supra*, note 4.

<sup>33</sup> 11 C.F.R. § 100.72(b).

<sup>34</sup> FEC Adv. Op. 1981-32 (Askew).

<sup>35</sup> FEC Adv. Op. 2015-09 (Senate Majority PAC and House Majority PAC) at 5.

<sup>36</sup> 11 C.F.R. §§ 100.72(b), 100.131(b). The regulations provide that that the following activities by the individual will indicate a decision to be a candidate: (1) use of general public political advertising to publicize his or her intention to campaign for Federal office; (2) raising funds in excess of what could reasonably be expected to be used for exploratory activities or undertakes activities designed to amass campaign funds that would be spent after he or she becomes a candidate; (3) making or authorizing written or oral statements that refer to him or her as a candidate for particular office; (4) conducting activities in close proximity to the election or over a protracted period of time; or (5) taking action to qualify for the ballot under State law. *Id.*

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office.<sup>37</sup> For example, when considering the hiring of the consultant in Advisory Opinion 1981-32 discussed above, the Commission explained that, if the hiring of the consultant took place in a "factual context indicating" the individual had "moved beyond the deliberative process of deciding to become a candidate, and into the process of planning and scheduling public activities" to amass support for a federal campaign, such activity "would cease to be within the [testing the waters] exemption, and candidacy would arise."<sup>38</sup>

In the same opinion, the FEC also noted that certain activities proposed by the potential candidate appeared to be "less oriented to ascertaining whether there is an initial base of political support adequate to launch a campaign effort, and more oriented to shoring up a base already identified that will sustain an actual campaign effort" which could similarly suggest that a personal decision on candidacy had already been made.<sup>39</sup> The FEC has also found that public statements reportedly made by an individual's "advisers" regarding the individual's decision on candidacy may, when taken with other statements made by the individual, be indicative of whether the individual has made a decision to become a candidate.<sup>40</sup>

By issuing a video that can easily be categorized as an effort to "shor[e] up a base already identified that will sustain an actual campaign effort," and retaining certain vendors specifically for his 2018 Senate campaign, Hawley appears to have already come to a decision on his candidacy and has now moved on to the process of planning activities to amass support for his federal campaign.<sup>41</sup> Moreover, the fact that news sources report that Hawley's own associates have confirmed his plans

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<sup>37</sup> *Id.*

<sup>38</sup> FEC Adv. Op. 1981-32 (Askew).

<sup>39</sup> *Id.*

<sup>40</sup> See First General Counsel's Report, MUR 5934 (Thompson). The FEC General Counsel's office cited numerous statements by Senator Thompson as well as a statement of an adviser of Senator Fred Thompson as indicia that the Senator had decided to run for president. A majority of the FEC's Commissioners ultimately disagreed with the General Counsel's office on whether Senator Thompson had triggered candidacy. See Statement of Vice Chairman Petersen and Commissioners Hunter, McGahn, and Weintraub, MUR 5934 (Thompson).

<sup>41</sup> FEC Adv. Op. 1981-32 (Askew).

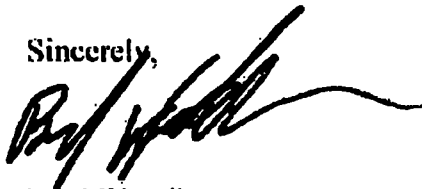


to run is similarly suggestive that Hawley has made up his mind.<sup>42</sup> And finally, Hawley's recent travels and the tweet from the president of the Susan B. Anthony List both suggest that Hawley is telling Republican stakeholders that he has made his decision and will be a candidate in the upcoming election. Because we know the cost of the activities to date well exceed the \$5,000 threshold for expenditures, Hawley has clearly satisfied the definition of candidate and is required to file and report as such with the FEC, which he has failed to do.

### C. REQUESTED ACTION

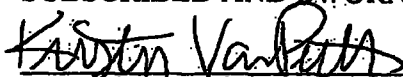
As shown, Missouri Attorney General Josh Hawley has decided to become a candidate for federal office but has not filed a Statement of Candidacy as is required under the Act and federal regulations. Respondents have also continued to pay for federal testing the waters activities with impermissible state funds in direct violation of the Act and federal regulations. We respectfully request that the Commission investigate these claims, enjoin Respondents from further violations of the Act and assign the maximum fines permitted by law.

Sincerely,



Brad Woodhouse,  
American Democracy Legal Fund

SUBSCRIBED AND SWORN to before me this 2<sup>nd</sup> day of August, 2017.

  
Notary Public

My Commission Expires:

11/30/2021



<sup>42</sup> Robbillard, *supra* note 12.

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